EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR THE NATURAL RESOURCES FOR THE STATE OF OKLAHOMA, Plaintiffs, v. TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC. and WILLOW BROOK FOODS, INC. Defendants.	§ §	Case No. 05-CV-00329 GKF-SAJ

AMICI CURIAE BRIEF OF THE TEXAS FARM BUREAU, TEXAS ASSOCIATION OF DAIRYMEN, TEXAS PORK PRODUCERS ASSOCIATION AND TEXAS CATTLE FEEDERS ASSOCIATION

TO THE HONORABLE COURT:

Amici Curiae Texas Farm Bureau, Texas Cattle Feeders Association, Texas Pork Producers Association, and Texas Association of Dairymen (collectively, "Amici Curiae") file, subject to leave of this Court, this Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction in the above-entitled and numbered cause. In support of the Brief, the Amici Curiae show as follows:

I.
INTERESTS OF THE AMICI CURIAE

The Amici Curiae collectively represent individuals and businesses involved in animal agriculture who own and raise livestock in the State of Texas. The agriculture industry in Texas is monolithic and generates more than $100 Billion annually to the Texas economy, including exports. The Texas agriculture industry now employs more than 2 Million statewide. It is comprised of individual producers that supply the market with beef cattle, dairy products, poultry, goats, swine and a variety of crops, among them cotton, corn, wheat, soybeans and rice. Many of these producers do a substantial business with the State of Oklahoma.

The Amici Curiae are actively engaged in policy-making in the Texas Legislature as well as other branches of the Texas government, including the agency charged with environmental quality in the State of Texas, the Texas Commission on Environmental Quality ("TCEQ"). These associations have been at the forefront of the regulatory approach that the State of Texas has taken regarding collection, storage and beneficial use of animal manure.

II.
INTRODUCTION

While having the allure of a more expedient approach to animal waste regulation, the Oklahoma Attorney General's application for a Resource Conservation and Recovery Act ("RCRA") 42 U.S.C §6901 et seq., based injunction is a perilous departure from established principles of the multi-faceted approach to agricultural waste regulation historically undertaken by legislatures and regulatory authorities. Noticeably absent from the pending injunction request are the voices and economic interests of production agriculture, not only in Oklahoma but also in many other states, including the State of Texas.

The "regulation by litigation" strategy undertaken by the Oklahoma Attorney General has strong echoes of the approach taken by the City of Waco in its 2004 federal court action against fourteen individual dairies in the State of Texas. *City of Waco v. Dennis Schouten et al.,* No. W-04-CA-118 (W.D. Tex. filed April 19, 2004). The City of Waco borrowed its Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. §§ 9601-9675 (West 2005) ("CERCLA") and Clean Water Act 33 U.S.C.A. §§ 1251-1387 (West 2001) ("CWA") strategy from the City of Tulsa's earlier action against various poultry-related entities, several of which are now defendants in the case before this Court. *City of Tulsa v. Tyson Foods, Inc. et al.* 258 F. Supp 2d 1263 (N.D. Okla. 2003). The Oklahoma Attorney General filed this case against poultry processors alleging theories nearly identical to the *City of Waco* and *City of Tulsa* cases. This class action approach being utilized by the Attorney General seeks to promulgate a ruling without affording the time, consideration and exchange that should be the *sine qua non* of such a sweeping requirement—one that could bind hundreds of thousands of individual agriculture operations, most of whom do not grow poultry, are not located in the Illinois River Watershed and do not operate in Oklahoma. The Amici Curiae therefore file this brief urging the Court to deny the Plaintiffs' request for injunctive relief.

III.
ARGUMENT

A. Regulation of Manure Application in Texas.

The State of Texas does not consider manure to be a hazardous waste. (Brief of Amicus Curiae Tex. Dep't of Agric. In Support of Defs.' Mot. Regarding Dismissal of CERCLA Claims, *City of Waco v. Dennis Schouten et al.*, No. W-04-CA-118 (W.D. Tex. Oct. 13, 2005)). Manure is not only a byproduct of food production but is a highly beneficial fertilizer and source of nutrients to farming operations producing forage and row crops. As prices for commercial

fertilizer have steeply risen, demand for animal manure fertilizer has also grown. Certain interest groups in the State of Texas have advocated for classifying manure as a hazardous waste. Neither the courts of the State of Texas nor the agencies of the State of Texas have given credence to this contention, remembering that animal manure is an essential source of nutrients for growing the crops and feed on which Texas Agriculture depends.

Texas has not, however, avoided the regulation of agriculture and animal waste. The State of Texas, through its Legislature (where a variety of interests can be considered), has enacted specific requirements and controls for the handling, storage and application of animal manure. TEXAS AGRICULTURE CODE ANN. § 201.026 (Vernon 2004); 30 TEX. ADMIN CODE §§ 321.31-321.47. Like any policy-based administrative or legislative decision there are always those individuals or groups that contend that existing regulations and statutes do not go far enough. The City of Waco is one such group.

B. The City of Waco's Failed Effort to Regulate Through Litigation.

The City of Waco is located in Central Texas and has more than 110,000 residents. The City's water supply is drawn from Lake Waco, located within the city limits. For more than a decade, the City of Waco has waged a battle with dairy operations located over 100 miles upstream from the Lake even though numerous municipal wastewater treatment plants have been estimated to contribute more than 20,000 pounds of total phosphorus to the waterway annually. *An Implementation Plan for Soluble Reactive Phosphorus in the North Bosque River Watershed,* Texas Commission on Environmental Quality, p. 30 (December 2002). The City contends that the presence of dairies has overloaded the streams with nutrients, thus causing taste and odor problems in the City's water service. The dairy industry has long disputed this assertion, and this issue has wound its way through the Texas Legislature and TCEQ, among other governmental

agencies. Significantly, on each occasion that the State of Texas acted in this area, a complete, full and public process took place, whereby all involved and all potentially impacted could be heard.

In 2004, TCEQ conducted a rulemaking where stronger regulations over dairies were considered. 29 Tex. Reg. 6662 (2004). The City of Waco played an active role in this rulemaking, as did the dairy industry. In the Spring of 2004, TCEQ announced a new set of stronger rules that would govern the operation of the dairies. 29 Tex. Reg. 2550 (2004). Aggrieved that TCEQ did not adopt all of its requested rules, the City of Waco elected to file suit before the rules were even final based upon an approach identical to the pleadings in the *City of Tulsa* litigation. *City of Waco v. Schouten et al.* No. 04-CA-118 (W.D. Tex filed April 19, 2004). Through its suit, the City of Waco sought to override the TCEQ rulemaking and compel the enforcement of the rejected rules on waste handling, premised on a finding that manure was a hazardous waste. During the two year pendency of the *City of Waco* case, the Oklahoma Attorney General filed this action mimicking the pleadings of the *City of Waco* and the *City of Tulsa* cases. After nearly two years of litigation, the loss of several dairies and the loss of more than $3 million in tax revenues, the City of Waco's case was resolved by an agreement, which did not include any monetary payments.

C. The Oklahoma Scenario is the Same.

The Oklahoma Attorney General's Original Complaint was filed in 2005 alleging the very same theories under CERCLA and the CWA that were first utilized in the *City of Tulsa* case and later mirrored by the City of Waco. The basis of each of these complaints was that manure applied by agriculture operations, quite distant from the water supply at issue, should be determined to be a hazardous waste and therefore regulated in accordance with the standards

sought by the complaining parties. In each case, Plaintiffs sought adjudication on behalf of a large class of citizens. These lawsuits do not represent a case or controversy appropriate for adjudication by a court of law but are instead a technique to accomplish broader policy goals regarding manure handling and application.

During the pendency of this case, the Oklahoma Attorney General and the City of Waco both appeared before Congress to lobby for legislative changes on the regulation of manure. *Meeting America's Wastewater Infrastructure Needs in the 21st Century: Hearing before Senate Committee on Environment and Public Works*, 110th Congress (2007) (testimony of Drew Edmondson, Oklahoma Attorney General,); *The Impact of Agriculture on Water Quality: Hearing Before the Subcomm. on Water Res. and Env't of the House Comm. on Transp. and Infrastructure*, 110th Congress (2007) (testimony of Wiley Stem, Assistant City Manager, Waco, Texas). The testimony echoed the allegations of the suits and advocated the underlying policy goals of subjecting agriculture to greater regulation of manure.

The *Tulsa* and *Waco* cases and this case all bear one common goal: regulate an otherwise complex aspect of the agriculture industry by class action. The Plaintiffs, dissatisfied with the work of legislatures and environmental agencies, seek to compel their own standard under the weight of draconian damages. The harms of such an approach are obvious. Litigation is expensive, and vast amounts of taxpayer funds will be lost to lawyers that could otherwise be directed to solutions.

It is the harm to the regulatory process itself, however, that is most significant. Subjecting the regulated community to public vilification in the name of environmental progress irrevocably polarizes the interests such that the give and take of legislation and rulemaking may no longer be a viable option. Once endorsed, the "regulation by litigation" strategy will become

the tool of interest group after interest group—all seeking to impose their own standard in the name of and for the benefit of their constituent members. Then, in terms of effective and predictable environmental regulation, the foundations will be lost. Individual producers stand to lose the most. Every operator trying to meet their margins must have a reliable environmental standard to meet and finance. Producers that have borrowed millions to operate will no longer be willing to do so if their compliance standard and cost basis can change unexpectedly. While legislatures and administrative agencies may be agonizingly slow for those seeking change, they represent foundational approaches to policy-making, ensuring that all those potentially affected may be heard. Litigation, for all its virtue, fails in that regard.

D. The Danger That the State of Oklahoma Seeks.

Putting aside the legal and factual constituents to the Attorney General's request, the terms of the requested injunction itself demonstrate that the ultimate reach is well beyond poultry operations and the Illinois River Watershed. The requested injunction would enjoin:

1) The application of poultry waste to any land within the Illinois River Watershed;

2) Allowing the application of poultry waste generated at poultry feeding operations to any land within the Illinois River Watershed; and

3) Any other relief deemed necessary to enjoin the above.

(Motion for Preliminary Injunction at p. 1) In a telling admission, the Oklahoma Attorney General describes the remedy as a "moratorium" on land application. (Motion for Preliminary Injunction at p. 9) And a complete moratorium is indeed what the Motion suggests this Court should impose for a period of time yet to be defined by the Attorney General. Adjudicating an absolute prohibition against the use of manure as fertilizer throughout the entire 1 million acre watershed is a dangerous precedent. It necessitates the Court enjoining land that has not been sampled or studied as well as landowners and operators that are not before the Court to be heard.

The development and enforcement of an enormous watershed-wide moratorium on application of manure may be proper for legislation or regulation, but not litigation. In a legislative or regulatory environment, interested parties can appear and be heard or face the consequences of failing to do so. Here, as the Attorney General has framed the relief, those to be regulated are silenced and compelled to accept a ban on the application of manure as fertilizer. Aside from other operational impairments to producers, a complete prohibition will force countless farming operations to buy increasingly expensive commercial fertilizers to substitute for the lost manure. Entirely absent from the Attorney General's Brief is any consideration of the impact of such a moratorium on operators who spread manure from other livestock animal classes. Under the logic put forward by the State of Oklahoma, the application of this manure poses the same imminent risks. No leap is required to read the injunction as having the effect of enjoining directly or indirectly *any* application of animal waste in the Illinois River watershed, resulting in an inconceivable detriment to operators and farmers not before the Court.

The suggested basis for the injunction is the imminent threat of harm to humans posed by bacteria that are allegedly running off into the Illinois River Watershed. (Motion for Preliminary Injunction at pp. 19-20) The Motion provides very little in the way of evidence regarding individual operations and their practices or regarding the ultimate users of the manure and their soil samples and crop requirements. The Attorney General's request justifies the requested relief only from a macro perspective. To grant this relief, the Court is required to make an unidentified assumption that all practices, operations, uses of manure, crop selections and soil needs are the same across the entire Illinois River Watershed. Such a leap is troubling to say the least but is particularly disturbing where the affected parties are not present to be heard. And finally, the

Attorney General has yet to opine on where all of the unapplied but generated waste will be stored or utilized.

E. The Unintended Harm of an Injunction.

The Oklahoma Attorney General is pursuing a policy goal that he deems important to the citizens of the State of Oklahoma, which is squarely within the role of his elected office. However, while a class action approach may have worked well against cigarette manufacturers, it amounts to firing a gun into a crowd where environmental regulation of agriculture is concerned. An injunction from this Court will cause profound and far reaching impacts not only in Oklahoma and Arkansas but also in the State of Texas. The injunction request poses the anomaly of one state's regulatory process being overridden by the policy judgment of elected leaders in another state.

While this Court's ruling would not directly bind beef ranchers, dairy farmers, cattle feeders and row crop farmers, the implications of such a decision would be devastating to the agriculture economy in Texas and elsewhere. Producers that generate, handle and transport manure, as well as those agricultural operations that contract to purchase and use the manure will be cast into a troublesome legal uncertainty at best. Any decision by this Court ruling that manure is subject to RCRA and its extensive requirements will immediately subject countless producers across the United States to the threat of liability and simultaneously launch a brushfire of declaratory actions, legislation and administrative rulemakings. Advocates of greater controls over agriculture will launch citizen suits premised upon such a broad ruling and the agriculture business community will be compelled to pursue immediate clarification. This will leave state law in disarray and producers in an impossible quandary: operate according to state law and risk federal RCRA penalties. Simply put, agriculture operations cannot operate if they face the risk

of liability for transporting, spreading or mishandling a RCRA waste. The proposed moratorium also affords producers no guidance as to how compliance could be ultimately achieved, short of the Attorney General's permission. And just as the City of Tulsa's technique brought about additional, similar lawsuits, the Attorney General's novel attempt to stop the use of manure as fertilizer through RCRA is sure to encourage others who share the same policy goals. Then once again, the foundations of regulation through legislation and administrative rules will be abandoned for the courthouse.

IV.
CONCLUSION

The fundamental basis of the courts is the right to be heard before being bound. The Attorney General seeks to give RCRA talismanic effect over complex questions better left to state legislatures, regulatory agencies and Congress. There are far too many affected parties not before this Court to grant the requested relief. The list grows too long for a conclusion but must include all poultry farmers in the Illinois River Watershed, cattle raisers, row crop farmers, pork producers, dairies and beef feeding operations as well as adjoining states and their departments of agriculture and environmental agencies. Adjudicating any dispute amongst all of these interests becomes impossible for one court. And that is the point; the complex dispute raised by the Attorney General and its eventual solution lies in a deliberative body, not this Court.

V.
PRAYER

The Texas Farm Bureau, Texas Cattle Feeders Association, Texas Pork Producers Association and the Texas Association of Dairymen respectfully pray that the Court deny the request for injunctive relief against manure application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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And I hereby certify that a true and correct copy of the above and foregoing has been mailed via U.S. Mail, postage prepaid and addressed properly, on the following who are not registered participants of the ECF System:

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